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E08-FIS-07-04a

**CESR and ERGEG advice to the European Commission in the
context of the Third Energy Package**

Response to Question F.20 – Market Abuse

Feedback Statement: Evaluation of Comments

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October 2008

Background

1. On 21 December 2007, the European Commission (Commission) issued a joint mandate to CESR and ERGEG asking for technical advice pursuant to Articles 22f and 24f and Recitals 20 and 22 respectively in the two proposals for Directives amending Directive 2003/54/EC and Directive 2003/55/EC (The Third Energy Package).
2. The mandate requested joint advice from CESR and ERGEG on issues concerning record keeping and transparency of transactions in electricity and gas supply contracts and derivatives. Advice was also sought on a possible clarification of the scope of the Market Abuse Directive (MAD) in relation to trading in energy and energy derivatives.
3. When CESR and ERGEG drafted the response regarding market abuse (question F.20 of the mandate), they took into account the advice already given by CESR and the Committee of European Banking Supervisors (CEBS) with regard to commodities and related derivatives markets.
4. CESR and ERGEG published a consultation paper entitled "CESR and ERGEG advice to the European Commission in the context of the Third Energy Package - Draft Response to Question F.20 - Market Abuse" (Ref. CESR/08-509) on 21 July 2008. Comments were invited by 29 August 2008.
5. 36 responses (one of which was confidential) were received from various associations and other interested parties. A full list of the 35 respondents and the responses they provided has been published on the CESR and ERGEG websites. The list is also included in the Annex of this Feedback Statement: Evaluation of Comments.
6. The purpose of this Feedback Statement: Evaluation of Comments is to provide a summary of the main comments received by CESR and ERGEG along with an explanation of CESR's and ERGEG's preferred approach on the most significant issues raised.

Question F.20 of the mandate

7. The question F.20 of the Commission mandate consists of three sub-questions (Q1-Q3):
 - Q1: Is the scope of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) such as to properly address market integrity issues in the electricity and gas markets?
 - Q2: Would the assessment be different if greater transparency obligations in line with the analysis above¹ were adopted?
 - Q3: What suggestions do regulators have to mitigate any shortcomings?

¹ This refers to questions 11 to 19 on transparency in the Commission Call for Technical Advice.

Feedback on comments regarding existence of market failure

8. A number of respondents questioned the existence of a market failure in the energy markets with regard to practices which would fall under a market abuse regime. Moreover it was mentioned that the description of market failures in the consultation paper was mixing up competition and market abuse issues. Where references to the Commission Sector Inquiry were made respondents argued that the observations made in the Sector Inquiry are not up-to-date.
9. On the other hand a number of respondents confirmed and welcomed the perception of the market failure. Some respondents expressed also the view that market failures in the electricity and gas markets are related to other markets (such as CO₂, coal, etc.).
10. CESR and ERGEG are aware of the fact that many issues described in the advice do not refer to specific cases. But due to the lack of a full and in-depth market monitoring exercise and the unavailability of the required information for regulators, the extent to which such practices take place cannot be evaluated by CESR and ERGEG. As long as the necessary information is not available to regulators, actual abusive behaviour is difficult to detect. As long as regulators do not have access to data they require to evaluate the possibility for market abuse to take place and to take appropriate action to prevent it, it is likely that the conditions that currently exist that could allow market abuse to go undetected and/or unprosecuted will remain unchanged. CESR and ERGEG remain concerned about the potential for such abuses to take place.
11. However, CESR and ERGEG have amended the advice following the comments made in the public consultation and clarified the basis for the description of the perceived market failure.
12. Clarifications have also been included with regard to the distinction between market power and competition issues on the one hand and pure market abuse issues on the other hand. CESR and ERGEG acknowledge that there is a difference between market abuse regimes and competition law. Market abuse may take place regardless of the market structure and the level of competition. However, market manipulation and the existence of market participants with dominant positions might be linked. Moreover CESR and ERGEG do not intend to interfere with the competences of competition authorities.
13. Regarding comments concerning the relationship between other commodity markets and the electricity and gas markets CESR and ERGEG acknowledge that these relationships do exist. However, the scope of the Commission's mandate given to CESR and ERGEG is clearly in the electricity and gas markets. Therefore the elaboration of the advice is limited to these markets.

Feedback on comments regarding transparency of fundamental data

14. CESR and ERGEG distinguished in the consultation paper between pre- and post-trade transparency on one hand and transparency of fundamental data on the other hand. It was concluded that enhanced pre- and post-trade transparency would not be sufficient in the context of market abuse. However, CESR and ERGEG called for enhanced and harmonised transparency of fundamental data in relation to a market abuse regime. The disclosure of this data should be legally binding.

15. The distinction made by CESR and ERGEG was welcomed and widely shared by the respondents. Furthermore, most respondents supported the proposal for legally binding and harmonised disclosure of fundamental data. Considering that support the advice was not changed with regard to transparency issues.
16. However, a number of respondents expressed concerns regarding pre- and post-trade transparency and potential transaction reporting obligations. Since these topics will be subject to a separate consultation under the Commission's mandate CESR and ERGEG did not consider these comments in the advice on market abuse.

Feedback on comments regarding the definition of inside information

17. A number of respondents raised the issue of inside information, which would be relevant under any market abuse regime. It was questioned whether the definition of inside information was sufficiently clear in the consultation paper. Respondents had different views regarding the best way to define inside information. Whereas some expressed preferences for an exhaustive list, others stated that all price sensitive information should be considered as being inside information and argued that it might be difficult to capture all different possibilities of price sensitive information in an exhaustive list.
18. CESR and ERGEG consider this as an important element of a market abuse framework. Therefore clarifications regarding this issue have been included in the advice following the public consultation.
19. CESR and ERGEG are of the opinion that for any market abuse framework to work effectively, it is vitally important that it covers any data or information that may have an effect on the price formation process. In electricity and gas markets, price sensitive fundamental data will primarily be information regarding infrastructure and data concerning the operation of the system. However, data not strictly related to infrastructure or the operation of the system can also influence the prices of electricity and gas. Such data must also be covered by any legislation covering market abuse. CESR and ERGEG are therefore in favour of having a non-exhaustive list for defining this information.

Feedback on comments regarding the applicability of MAD and a new sector specific framework on market abuse

20. The respondents mostly agreed with the finding of the paper that the scope of MAD does not properly address market integrity issues in the electricity and gas markets. The suggestion that the Commission should consider developing and evaluating proposals for a basic, tailor-made market abuse framework in the energy sector legislation for all electricity and gas products not covered by MAD was in general agreed on. However, some respondents considered the existing rules to be sufficient and denied the need of a tailor-made market abuse regime. Others pointed out that the implementation of sufficient disclosure obligations would make a tailor-made regime dispensable. The majority of respondents welcomed a tailor-made market abuse framework.
21. The views regarding how the tailor-made market abuse framework should look differed. Some respondents suggested that the tailor-made market abuse regime should cover all electricity and gas contracts regardless of the market where the contracts are made. Others emphasised the importance of a regime for transmission of information between securities and energy regulators. Respondents pointed out that the tailor-made framework should

establish the relation between securities supervision, general competition rules and the proposals of the Third Energy Package.

22. Many respondents suggested a thorough impact assessment and cost-benefit analysis while developing the tailor-made market abuse regime. A system for guaranteeing the harmonised application of the EU legislation was considered to be useful. The principles of the Lamfalussy process were said to be a good example for such a system. The tailor-made regime should not put an unnecessary burden especially on smaller companies or establish market entry barriers.
23. CESR and ERGEG are convinced that a tailor-made market abuse regime is needed to address insufficiencies in the electricity and gas markets. However, it was not their task to come up with a proposal for a complete regulatory framework. Thus all the points assessed cannot be fully assessed at this stage.

Feedback on other comments

24. Some respondents denied any regulatory gap in the existing legislation. Furthermore, they considered that the legislative proposals of the Third Energy Package should solve existing shortcomings in the electricity and gas markets. CESR and ERGEG rejected this opinion because the Third Energy Package does not include market abuse.
25. Some respondents suggested that in order to foster market efficiency the regulators should focus on unbundling. Other respondents criticised the remarks made on unbundling by CESR and ERGEG in the consultation paper. Although unbundling remains an important issue, it was not the focus of the consultation paper and CESR and ERGEG are of the opinion that market abuse is not a competition issue.

Responses to the Consultation Paper (Ref. CESR/08-509)

1. Saxonian Exchange Supervisory Authority
2. Merrill Lynch
3. Energywatch
4. INEOS
5. ISDA FOA
6. Statoil Hydro
7. AMAFI
8. Association of Austrian Electricity Companies (VEÖ)
9. British Energy
10. CFA Institute Centre
11. ECT-Group
12. Edison
13. EFET
14. EnBW
15. ENEL S.p.A.
16. ENI
17. E.ON
18. Eurelectric
19. Eurogas
20. European Federation of Public Service Unions (EPSU)
21. GEODE
22. German Association of Energy and Water Industries (BDEW)
23. German Association of Local Utilities (VKU e.V.)
24. Scottish and Southern Energy plc.
25. UK Association of Electricity Producers
26. VDM Energy Trading
27. VIK
28. CEZ a.s.
29. EDF Trading
30. EEX
31. ENDEX European Energy Derivatives Exchange N.V.
32. Nord Pool ASA
33. Nord Pool Spot AS
34. Powernext
35. PSIRU, University of Greenwich